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BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In Re Applications of

LIBERTY CABLE CO., INC.

For Private Operational Fixed
Microwave Service Authorizations and
Modifications

New York, New York

) WT Docket No. 96-41

)

) File Nos.

)

) 708777 (WNTT370)

) 708778, 713296 (WNTM210)

) 708779 (WNTM385)

) 708780 (WNTT555)

) 708781, 709426, 711937 (WNTM212)

) 709332 (NEW)

) 712203 (WNTW782)

) 712218 (WNTY584)

) 712219 (WNTY605)

) 713295 (WNTX889)

) 713300 (NEW)

) 717325 (NEW)

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To: Administrative Law Judge Richard L. Sippel

JOINT MOTION TO ENLARGE ISSUES

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Dated: July 12, 1996

No. of Copies rec'd. 46
List A B C D E

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SUMMARY

New documentary evidence in this proceeding leads to the conclusion that Liberty Cable Co., Inc. ("Liberty") misrepresented facts and lacked candor toward the Commission during discovery about when Liberty first learned that it had been operating OFS facilities without the Commission's authorization.

A memorandum, dated February 24, 1995, prepared by Liberty's counsel and produced June 27, 1996 by Liberty ("the Lehmkuhl Memorandum") is an inventory of all Liberty's licenses and all Liberty's pending OFS license applications. The Lehmkuhl Memorandum raises serious questions about the veracity of the sworn testimony in this proceeding of Liberty's president and of its then director of engineering. Peter Price, Liberty's President, and Behrooz Nourain, Liberty's former Director of Engineering, gave sworn deposition testimony in May 1995 that they had no knowledge of Liberty's unauthorized operations until May 5, 1995 and April 20, 1995, respectively. The Lehmkuhl Memorandum was addressed to both Messrs. Price and Nourain. The Lehmkuhl Memorandum and other information in Messrs. Price and Nourain's possession in late February 1995 lead to the conclusion that Messrs. Price and Nourain knew about certain of Liberty's unauthorized operations when they received the Lehmkuhl Memorandum, much earlier than they represented in their respective depositions.

Time Warner Cable of New York City and Paragon Cable Manhattan ("TWCNYC") together with Cablevision of New York City - Phase I ("Cablevision") therefore move, pursuant to FCC Rule 1.229(b)(3) to enlarge the issues designated for hearing in the above-captioned proceeding to determine whether Liberty Cable Co., Inc. ("Liberty") should be disqualified from holding FCC licenses because Peter Price, Liberty's President, and

Behrooz Nourain, Liberty's Director of Engineering, have made material misstatements and misrepresentations to the Commission under oath in this proceeding.

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To: Administrative Law Judge Richard L. Sippel

JOINT MOTION TO ENLARGE ISSUES

Time Warner Cable of New York City and Paragon Cable Manhattan ("TWCNYC"), as well as Cablevision of New York City - Phase I ("Cablevision"), by their counsel and pursuant to Section 1.229(b)(3) of the FCC rules, herein move to enlarge the issues designated for hearing in the above-captioned proceeding to determine whether Liberty Cable Co., Inc. ("Liberty") should be disqualified from holding FCC licenses because Peter Price, Liberty's President, and Behrooz Nourain, Liberty's former Director of Engineering, have made material misstatements and misrepresentations to the Commission under oath in this proceeding. This Motion is the result of Liberty's belated production, under specific order

of the Presiding Judge, of a document that contradicts the sworn deposition testimony of Messrs. Price and Nourain.

While these two persons repeated Liberty's previously-made claim that the company was "unaware" that its pending OFS path applications had not been granted at the time it activated the paths identified in Appendix A to the Hearing Designation Order, a document produced by Liberty after these witnesses were deposed directly contradicts these assertions. In fact, Liberty's FCC counsel advised Messrs. Price and Nourain that applications for 13 of the paths listed on Appendix A were "pending," without STAs or STA requests, just weeks after Liberty had activated some of these 13 paths, and within weeks of when it would activate the other paths.

A memorandum, dated February 24, 1995, prepared by Liberty's FCC counsel and produced June 27, 1996 by Liberty ("the Lehmkuhl Memorandum") is an inventory of all Liberty's licenses and all Liberty's pending OFS license applications. The Lehmkuhl Memorandum raises serious questions about the veracity of the sworn testimony in this proceeding of Liberty's president and of its then director of engineering.¹ Peter Price, Liberty's President, testified under oath on May 28, 1996 that he knew of Liberty's illegal operation of microwave paths only after May 5, 1995 when TWCNYC filed its Reply to

¹Within the scope of the issues already designated in this proceeding, the Lehmkuhl Memorandum also raises serious questions about the truthfulness of Liberty's representations to the Commission about the facts and circumstances surrounding Liberty's activation of unlicensed microwave facilities. These representations were made in written submissions to the Commission in May and June 1995 by Mr. Price and by Howard Barr, a partner at the same law firm as Mr. Lehmkuhl and identified on the face of the Lehmkuhl Memorandum as having received a copy. By a separate Motion, TWCNYC will seek leave from the Presiding Judge to depose Mr. Barr about these matters. Such discovery is independent of this Motion, and should be allowed to proceed without delay.

Liberty's Opposition to Petition to Deny.² Similarly, Behrooz Nourain, Liberty's then Director of Engineering, testified on May 29, 1996 that he had no knowledge of Liberty's illegal operation of OFS facilities prior to late April 1995.³

The Lehmkuhl Memorandum, addressed to Messrs. Price and Nourain, makes two critical points - (1) that as of February 24, 1995, Liberty had not been granted applications for any of the 13 sites that are listed in the Lehmkuhl Memorandum and in the Commission's Hearing Designation Order as being activated without authorization,⁴ and (2) that Liberty was not operating under any STAs as of the date of the Lehmkuhl Memorandum, and indeed, had not even filed any STA requests for the 13 sites as of the date of the Lehmkuhl Memorandum.⁵

Documentary evidence strongly suggests that both Messrs. Price and Nourain knew that Liberty had activated microwave paths to the sites listed in the Lehmkuhl Memorandum, including paths to sites for which applications were "pending " Mr. Price received weekly "Operations Reports" that listed the addresses at which Liberty was currently providing service, as well as those for which service was being installed or planned for installation;⁶

²Price Dep., p. 208, lines 2-7, 12-17; Ex. 1 to Beckner Decl.

³Nourain Dep., p. 76, lines 18-22, p. 77, lines 1-6; p. 97, lines 19-22, p. 98, lines 6-8; Ex. 2 to Beckner Decl.

⁴See infra notes 21- 33.

⁵Lehmkuhl Mem. at FCC/CP 016139; Ex. 3 to Beckner Decl. App. A to Hearing Designation Order, adopted Mar. 4, 1996 ("HDO").

⁶Price Dep. at p. 64-66, lines 4-6; Ex. 1 to Beckner Decl.

and Mr. Nourain himself activated the microwave paths.⁷ Since they knew, on a regularly updated basis, the addresses to which Liberty had commenced service, and since they were told by the Lehmkuhl Memorandum that Liberty's applications for the microwave paths required to provide service to these locations were "pending," serious questions exist about whether these Liberty officials made misrepresentations and material omissions of fact to the Commission when they testified they had no knowledge of Liberty's unlicensed activities until TWCNYC raised the issue at the FCC.

ARGUMENT

A. Both Mr. Price And Mr. Nourain Testified As To Their Ignorance Of Any Unlicensed Operations Until They Learned Of TWCNYC's Allegations.

Liberty admits that it illegally activated microwave pathways to 19 different sites in 1994 and 1995. Liberty contends it did not know it had been operating any microwave paths illegally until, at the earliest, late April 1995.⁸ Liberty claims that it unlawfully commenced service as the result of a "breakdown in communications between its administrative offices and its engineering offices"⁹ Liberty explains that following submission of applications to the Commission, Behrooz Nourain, Liberty's then Director of Engineering, "perhaps inadvisably, assumed grant of the STA requests, which in his experience has always been granted within a matter of days of filing."¹⁰

⁷Surreply of Liberty Cable Co. ("Liberty's Surreply"), May 17, 1995 at 3.

⁸Liberty's Surreply at 3

⁹Id. at 2.

¹⁰Id. at 3.

On May 28, 1996, Liberty President Peter O. Price gave his sworn deposition in this proceeding under oath, pursuant to the order of the Presiding Judge. In his deposition, Mr. Price unequivocally states that he had no knowledge that Liberty was providing unauthorized service prior to the time he learned of TWCNYC's May 5, 1995 Reply to Liberty's Opposition to Petition to Deny. Mr. Price answered the deposition questions as follows:

Q: I think we established through your testimony that you became aware of the fact that Liberty was providing unauthorized service as a result of the May 5th filing by Time Warner with the FCC

A: Yes. . . .

Q: The question is, to your personal knowledge, did you, yourself - meaning Peter Price, not necessarily Liberty Cable as an entity - have any knowledge prior to hearing or learning of the allegations in Time Warner's pleading?

A: No, I did not. Absolutely no, I did not.¹¹

Mr. Price also testified that he received Liberty's weekly "Operations Reports."¹²

The weekly Operations Reports listed all buildings to which Liberty was providing service,¹³ and would have included, at appropriate times (including prior to activation), the 19 addresses to which Liberty illegally operated OFS microwave pathways.¹⁴ Mr. Price

¹¹Price Dep., p. 208, lines 2-7, 12-17 (emphasis added); see also Price Dep., pp. 182 - 185, Ex. 1 to Beckner Decl.

¹²Id. at p. 65, lines 4-6; Ex. 1 to Beckner Decl

¹³Id. at p. 68, lines 1-6, Ex. 1 to Beckner Decl ; see Nourain Dep. at p. 63, lines 5-9, Ex. 2 to Beckner Decl.; Ontiveros Dep., pp. 82-99, Ex. 4 to Beckner Decl.

¹⁴TWCNYC is unable to supply Operations Reports from February 1995, because Liberty, apparently pursuant to an oral agreement with Bureau Counsel, produced only a sampling of such reports in response to the Bureau's discovery requests. TWCNYC also notes that Liberty failed to produce the Lehmkuhl Memorandum until well past the time of the depositions of Messrs. Price and Nourain. Consequently, the parties were unable to explore the import of the Memorandum with key witnesses. TWCNYC has attached, as an

thus must have been aware that Liberty was providing service to those sites. As set forth above, however, Mr. Price testified that he did not know that Liberty had activated the pathways illegally until after May 5, 1995.

Behrooz Nourain, Liberty's Director of Engineering,¹⁵ activated microwave paths on Liberty's behalf.¹⁶ He also signed the applications for OFS authorization which Liberty submitted to the Commission.¹⁷ Mr. Nourain gave his sworn deposition on May 29, 1996:

Q: Did there come a time where you learned that Liberty had been operating certain facilities without FCC authorization?

A: Yes.

Q: And at what point did you learn this?

A: About April 20, end of April '95.

Q: How did you come to learn about this knowledge?

A: If I remember, some of the information from Time Warner of some of these buildings without authorization.¹⁸

Q: Sitting here today, are you aware of any instances where facilities went into operation and there was not even an application on file? ...

example, one of the Operations Reports provided as part of Exhibit 7 to the Declaration of Anthony Ontiveros. See Ex. 4 to Beckner Decl.

¹⁵Declaration of Behrooz Nourain in Support of Liberty's Surreply, May 17, 1995. Mr. Nourain no longer occupies the position as director

¹⁶Liberty's Surreply at 3

¹⁷Nourain Dep. pp. 42-45

¹⁸Id. at p. 76, lines 18-22, p. 77, lines 1-6

A: . . . At no instances did I turn any system on without realizing that I was not authorized to turn the system on¹⁹

On June 26, 1996, approximately one month later, the Presiding Judge ordered Liberty to produce certain documents. Among the documents is a memorandum from Liberty's legal counsel to Messrs. Price and Nourain. This Memorandum, dated February 24, 1995, from Michael Lehmkuhl, of Pepper & Corazzini lists, inter alia, the application status of microwave paths to 13 of the 19 receive addresses the Commission later identified in the Hearing Designation Order as being operated without authorization. The Lehmkuhl Memorandum states that the applications for each of the 13 addresses are "pending" (i.e., not granted), and sets forth the relevant information as follows:²⁰

<u>Path Name</u>	<u>Status</u>
16 West 16th St.	p ²¹
Resident Hall, NYU Campus	p ²²
Greenburg Hall, NYU Campus	p ²³
6 East 44th Street	p ²⁴
25 West 54th Street	p ²⁵

¹⁹Id., p. 97, lines 19-22, p. 98, lines 6-8

²⁰The Memorandum designates pending applications with a "P" and granted applications with a "G." Each of the following sites also appear in Appendix A to the Commission's HDO.

²¹Lehmkuhl Mem. at FCC/CP 016146; Ex. 3 to Beckner Decl.

²²Id. at FCC/CP 016147

²³Id.

²⁴Id. at FCC/CP 016148.

²⁵Id. at FCC/CP 016151.

30 Waterside	p ²⁶
114 East 72d Street	p ²⁷
524 East 72d Street	p ²⁸
433 East 56th Street	p ²⁹
639 West End Avenue	p ³⁰
35 West End Avenue	p ³¹
441 East 92d Street	p ³²
567 Fifth Avenue	p ³³

Liberty, through Mr. Nourain, had already activated paths to nine of the 13 sites at the time Mr. Nourain and Mr. Price received the Lehmkuhl Memorandum in February 1995.³⁴ By mid-April 1995, only a few weeks after receiving the Lehmkuhl Memorandum, Mr. Nourain had activated pathways to four additional sites, still without having received authorization from the Commission, and without Liberty having filed STA requests for any of the sites.³⁵ The conclusion is therefore inescapable that Liberty activated several facilities knowing that it was not licensed to do so and that, months before it was compelled

²⁶Id. at FCC/CP 016152.

²⁷Id.

²⁸Id.

²⁹Id.

³⁰Id. at FCC/CP 016158.

³¹Id.

³²Id. at FCC/CP 016162.

³³Id. at FCC/CP 016162. In some documents, 567 Fifth Avenue is listed as 767 Fifth Avenue. The 567 Fifth Avenue address appears to be the correct one.

³⁴See HDO, App. A

³⁵HDO, App. A.

to admit the fact to the Commission, Liberty also knew that it had activated many other OFS facilities without a license.

Moreover, it also appears that Liberty activated at least one, and possibly three, new transmitter facilities without Commission authorization -- a fact which makes Messrs. Price and Nourain's testimony even less plausible. Applications for transmitters located at 30 Waterside, 335 Madison, and 567 Fifth Avenue³⁶ had not been granted as of the date of the Lehmkuhl Memorandum and were still pending when Liberty activated each of the transmitters.³⁷ These unlicensed transmitters were, in turn, used to operate unlicensed paths. The site at 30 Waterside, for example, served 16 W. 16th Street,³⁸ and Liberty filed its application to transmit from 30 Waterside to 16 W. 16th Street on February 21, 1995.³⁹ Liberty commenced service to 16 W. 16th Street on March 28, 1995.⁴⁰ At that time, Liberty had no authority to operate either the 30 Waterside transmitter or the pathway from 30 Waterside to 16 W. 16th Street. The 567 Fifth Avenue transmitter and 335 Madison transmitter similarly were new transmitters with no authorization - STA or otherwise - to transmit to any receive sites. Nonetheless, they served pathways that Liberty activated without authorization. Messrs. Price and Nourain's claims of ignorance are therefore even less plausible, since they knew from page two of the Lehmkuhl Memorandum that Liberty

³⁶In some documents, 567 Fifth Avenue is listed as 767 Fifth Avenue. The 567 Fifth Avenue address appears to be the correct address.

³⁷Lehmkuhl Mem. at FCC/CP 016140; Ex. 3 to Beckner Decl.

³⁸Id. at FCC/CP 016146

³⁹See HDO, App. A

⁴⁰HDO, App. A.

had no authority to transmit from these three sites at all.⁴¹ Liberty has never even attempted to identify or explain this discrepancy, i.e., that it was operating not only unauthorized pathways, but completely unauthorized transmitters as well.

B. The Requested Issue Is Appropriate To This Case And Is Justified By The Available Evidence.

Commission Rule 1.229 permits enlargement of issues based upon the requisite showing under a two-step analysis.⁴² Initially, the Commission looks to whether "a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]."⁴³ In so doing, the "Commission must proceed on the assumption that the specific facts set forth [in the petition] are true."⁴⁴ Once this initial standard is met, the Commission looks to "the application, the pleadings filed, or other matters which it may

⁴¹The second page of the Lehmkuhl Memorandum makes clear that Liberty had no authority - STA or otherwise - to operate these three transmitters. Id. at FCC/CP 016140. Next to each of the pending applications, under the column labeled "STA?", appears an unequivocal "No." Id.

⁴²Rule 1.229 provides:

(a) A motion to enlarge . . . may be filed by any party to a hearing. . . .

(b)(3) . . . Motions for modifications of issues which are based on newly discovered facts shall be filed within 15 days after such facts are discovered by the moving party.

In this case, TWCNYC discovered new facts contained in the Lehmkuhl Memorandum on June 27, 1996, the day upon which TWCNYC received the document from Liberty. Consequently, July 12, 1996 is the appropriate filing date for TWCNYC.

⁴³Astroline Com. Co. Ltd. Partnership v. FCC, 857 F.2d 1556, 1561 (D.C. Cir. 1988), quoting 47 U.S.C. § 309(d)(1) (parenthetical in original).

⁴⁴Id., quoting Citizens for Jazz on WRVR v. FCC, 775 F.2d 392, 397 (D.C. Cir. 1985) (parenthetical in original).

officially notice" to determine if a "substantial and material question of fact" exists.⁴⁵ If a substantial and material question of fact has been raised, the Commission should conduct a hearing on the issue.⁴⁶

As set forth more fully below, the Lehmkuhl Memorandum raises substantial and material questions of fact as to whether Mr. Price, Liberty's president, and Behrooz Nourain, Liberty's then director of engineering, misrepresented facts and lacked candor toward the Commission. The Commission has recognized that:

In view of the fundamental importance of licensee truthfulness, the fact of a concealment or misstatement may have more significance than the actual fact concealed, FCC v. WOKO, 329 U.S. 223, 227 (1946), and we have explicitly refused to renounce our authority to consider even the most insignificant misrepresentation as disqualifying.⁴⁷

Stated otherwise, the Commission views an applicant's misrepresentation and lack of candor as a serious breach of trust.⁴⁸ An applicant has a duty "to be forthcoming as to all facts and information relevant to a matter before the FCC, whether or not such information

⁴⁵47 U.S.C. § 309.

⁴⁶857 F.2d at 1561.

⁴⁷San Joaquin Television Improvement Corp., 2 FCC Rcd 7004, 7005 (1987).

⁴⁸Swan Creek Communications v. FCC, 39 F.3d 1217, 1221-22 (D.C. Cir. 1994). As the Commission has stated:

Misrepresentations and lack of candor can indeed be distinguished in their manifestations: the former involves false statements of fact, while the latter involves concealment, evasion, and other failures to be fully informative. But both misrepresentation and lack of candor represent deceit; they differ only in form.

KQED, Inc., 1988 FCC LEXIS 2646, *34 (Rev. Bd. 1988), aff'd, 5 FCC Rcd 1784 (1990).

is particularly elicited."⁴⁹ "[T]ruthfulness and full candor are as much expected in discovery as they are with respect to submissions to the Commission itself."⁵⁰

Accordingly, the Commission "is not expected to play procedural games with those who come before it in order to ascertain the truth."⁵¹ For example, in Weyburn Broadcasting Ltd. Partnership v. F.C.C.,⁵² the Commission was required to designate a misrepresentation issue for hearing because, at least in part, the testimony of the applicant's key witnesses conflicted with the documentary evidence.⁵³

As demonstrated below, in light of Liberty's recent document production, substantial and material questions of fact exist regarding whether Messrs. Price and Nourain made knowing and willful misrepresentations and lacked candor toward the Commission. The evidence suggests that these witnesses knew upon receipt of the Lehmkuhl Memorandum that Liberty was operating certain microwave paths illegally because service had already started to addresses listed as "pending" as opposed to "granted" applications. Moreover, Liberty commenced service to several more addresses a few weeks after the Lehmkuhl Memorandum

⁴⁹39 F.3d at 1222, quoting Silver Star Communications, -- Albany, Inc., 3 FCC Rcd 6342, 6349 (Rev. Bd. 1988).

⁵⁰Kate F. Thomas, 8 FCC Rcd 7630 (Rev. Bd. 1993), quoting Edwin A. Bernstein, 6 FCC Rcd 6841, 6844 n.6 (1991).

⁵¹Garden State Broadcasting v. FCC, 996 F.2d 386, 393 (D.C. Cir. 1993), quoting RKO General, Inc. v. FCC, 670 F.2d 215, 229 (D.C. Cir. 1981), cert. denied, 457 U.S. 1119 (1982), 469 U.S. 1017 (1984).

⁵²984 F.2d 1220 (D.C. Cir. 1993).

⁵³See also Folkways Broadcasting Co., Inc., 33 FCC 2d 813, 816 (Rev. Bd. 1972) (granting motion to enlarge where evidence indicated that applicant had known of certain tape recordings about which it had formerly claimed ignorance).

identified them as the subject of "pending," not "granted " applications. Liberty has never, in any of its submissions, even mentioned the existence of the Lehmkuhl Memorandum that contradicts its president's and its chief engineer's testimony and impeaches its corporate claims of ignorance of the fact of its unlicensed operations. Consequently, TWCNYC's Motion to Enlarge Issues satisfies the initial showing that a grant of the applications would be prima facie inconsistent with the public interest, convenience and necessity, and, in conjunction with the record as a whole, demonstrates that a substantial and material question exists.

C. There Is Evidence That Mr. Price's and Mr. Nourain's Testimony Is False.

Mr. Price's sworn deposition testimony and sworn Declaration of May 17, 1995 are not credible. First, the Lehmkuhl Memorandum, addressed to Mr. Price, clearly states two critical facts -- (1) that as of February 24, 1995, applications had not been granted for any of the 13 paths,⁵⁴ and (2) that Liberty was not operating under any STAs,⁵⁵ and indeed, had not even filed STA requests for any of the 13 paths that were the subject of pending applications. Second, when he received the Lehmkuhl Memorandum, Mr. Price must have known from the weekly Operations Reports (that he personally reviewed and discussed with his senior staff every Thursday)⁵⁶ that Liberty, without a license, had activated most of the pathways identified as the subject of pending applications. Indeed, Mr. Price testified that one of the purposes of the operations reports was to coordinate licensing activity:

⁵⁴See supra notes 21-33

⁵⁵Lehmkuhl Mem. at FCC/CP 016139-40; Ex. 3 to Beckner Decl.

⁵⁶See Price Dep., pp 64-65, 260-61; Ex. 1 to Beckner Decl.

Q: Now, can you tell me the use that was made of these technical operations reports at the staff meeting.

A: The use was to coordinate the marketing with the installation procedure and to coordinate any licensing that was required in order to move from contract to installation.⁵⁷

Liberty had already activated -- in December 1994, January 1995 and February 1995 -- nine of the unauthorized sites listed in the Lehmkuhl Memorandum at the time the Lehmkuhl Memorandum was issued.⁵⁸ In fact, Liberty commenced service to one of the sites on February 6, 1995 -- less than three weeks prior to the date of the Lehmkuhl Memorandum -- and another on February 14, 1995 -- only ten days prior to the date of the Lehmkuhl Memorandum.⁵⁹ These two paths -- if not the remaining seven -- should have been fresh in Mr. Price's mind at the time he received the Lehmkuhl Memorandum. Moreover, as the Lehmkuhl Memorandum makes clear, applications for these two paths, as well as for the other seven, were still pending on February 24, 1995. Therefore, at the time he received the Lehmkuhl Memorandum, Mr. Price should have known that Liberty was operating at least two -- and as many as nine -- paths illegally. Moreover, in March and April 1995, Liberty activated paths to four more addresses, also listed in the Lehmkuhl Memorandum as the subject of pending applications.⁶⁰ These paths obviously were activated with knowledge by both Mr. Price and Mr. Nourain that no FCC license had been granted authorizing such activation.

⁵⁷Price Dep., p. 66; Ex. 1 to Beckner Decl.

⁵⁸HDO, App. A.

⁵⁹Id.

⁶⁰Id.

It is highly unlikely that Mr. Price simply made a mistake. The Lehmkuhl Memorandum is easily understood. It sets forth tables which include, among other items, the address to be served by the path and the status of each application. The Lehmkuhl Memorandum, on page one, clearly explains that a "P" in the status column means that an application is pending. A "G" means that an application has been granted. Each of the 13 path names at issue here have a capital "P" in the "status" column.⁶¹ It is thus inconceivable that Mr. Price could not have known that Liberty was providing unauthorized service along several microwave paths before TWCNYC made such allegations.

This evidence also contradicts the testimony of Mr. Nourain, Director of Engineering. Mr. Nourain asserts that he had no knowledge prior to the end of April 1995 that he had activated microwave paths without FCC authorization.⁶² The Lehmkuhl Memorandum, addressed to Mr. Nourain, as well as Mr. Price, makes this testimony completely implausible. First, Mr. Nourain himself activated Liberty's microwave paths. Next, the Lehmkuhl Memorandum was addressed to Mr. Nourain, just as it was addressed to Mr. Price. Third, Mr. Nourain had already activated several paths without authorization when he received the Lehmkuhl Memorandum,⁶³ and the Lehmkuhl Memorandum lists nine of those sites for which Liberty's applications were still "pending," not "granted."⁶⁴ Further, contrary to his sworn deposition testimony and his sworn Declaration of May 17, 1995, Mr.

⁶¹See supra notes 21 - 33.

⁶²Nourain Dep., p. 97, lines 19-22; p. 98, lines 6-8; Ex. 2 to Beckner Decl.

⁶³See Liberty's Surreply at 3; Nourain Declaration in Support of Surreply.

⁶⁴See supra notes 21 - 33.

Nourain could not have assumed that Liberty was operating under STAs, especially as to those nine sites as to which Liberty had already filed applications as of February 24, 1995.⁶⁵ On the first page of the Lehmkuhl Memorandum, Mr. Lehmkuhl writes that "Liberty is no longer operating under any STAs." nor had Liberty even filed any STAs for the 13 sites as of February 24, 1995.⁶⁶ Moreover, because it appears that Liberty had no authority to operate three of the transmitters that served some of the sites, Mr. Nourain's testimony becomes even more implausible. Consequently, Mr. Nourain's testimony, like Mr. Price's testimony, is inconsistent with the documentary evidence and raises grave questions about Mr. Nourain's candor toward the Commission in this proceeding, and, ultimately, raises questions as to whether Liberty should be disqualified from holding OFS licenses.

ISSUES REQUESTED

In light of the foregoing, TWCNYC and Cablevision respectfully request that the following additional issues be designated in this proceeding:

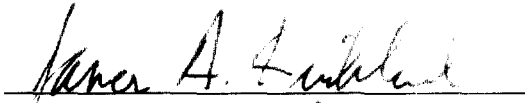
(1) To determine whether Liberty, and in particular, Peter Price and Behrooz Nourain, have made any misrepresentations or omissions, and/or violated the duty of candor in their sworn testimony in this proceeding.

⁶⁵Liberty's Surreply of May 17, 1996, supported by Mr. Nourain's Declaration, alleges that Mr. Nourain had "assumed [a] grant of the STA requests, which in his experience had always been granted within a matter of days of filing" Liberty's Surreply at 3 (emphasis added).

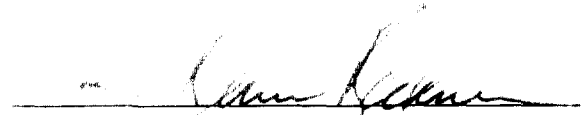
⁶⁶Id. (emphasis added).

(2) To determine, in light of the evidence adduced on issue (1), above, whether Liberty is basically qualified to hold and obtain OFS licenses and what additional sanctions and remedies would be appropriate, including the revocation of other existing authorizations.

Respectfully submitted,


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Attorneys for
 TIME WARNER CABLE OF NEW YORK CITY
 and
 PARAGON CABLE MANHATTAN

Dated: July 12, 1996

41391

CERTIFICATE OF SERVICE

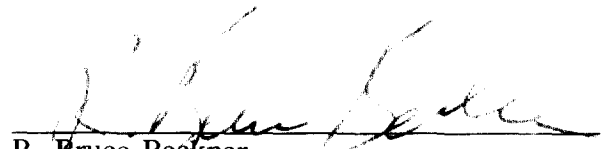
I, R. Bruce Beckner, hereby certify that a copy of the foregoing Joint Motion to Enlarge Issues was served, via facsimile and first class mail, this 12th day of July, 1996 upon the following:

Robert L. Begleiter, Esq.
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Joseph Weber, Esq.
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Federal Communications Commission
Wireless Telecommunications Bureau
Enforcement Division
2025 M Street, N.W., Room 8308
Washington, D.C. 20554
Facsimile: (202) 418-2644

The Honorable Richard L. Sippel
Administrative Law Judge
2000 L Street, N.W., Suite 220
Washington, D.C. 20554
Facsimile: (202) 418-1095



R. Bruce Beckner

DECLARATION OF R. BRUCE BECKNER

I, R. Bruce Beckner, do hereby declare and state under penalty of perjury as follows:

1. I am a partner at the law firm of Fleischman & Walsh, L.L.P., counsel for Time Warner Cable of New York City and Paragon Cable Manhattan (collectively "TWCNYC").
I make all statements herein based upon my personal knowledge.

2. Attached hereto as "Exhibit 1" is a true and correct copy of relevant portions of the Deposition of Peter O. Price, taken May 28, 1996 in Washington, D.C., as cited in TWCNYC's Motion to Enlarge Issues, July 12, 1996

3. Attached hereto as "Exhibit 2" is a true and correct copy of relevant portions of the Deposition of Behrooz Nourain, taken May 29, 1996 in Washington, D.C., as cited in TWCNYC's Motion to Enlarge Issues, July 12, 1996

4. Attached hereto as "Exhibit 3" is a document, dated February 24, 1996, produced to TWCNYC by Liberty Cable Co., Inc. ("Liberty") on June 27, 1996, bearing the author's name as Michael J. Lehmkuhl, Esq., and the addressees' names as Peter O. Price, Esq., Behrooz Nourain, and Thomas Courtney. This is a true and correct copy of the document as produced to TWCNYC.

5. Attached hereto as "Exhibit 4" is a true and correct copy of relevant portions of the Deposition of Anthony Ontiveros with relevant portions of Exhibit 7 to that Deposition, taken May 21, 1996 in Washington, D.C., as cited in TWCNYC's Motion to Enlarge Issues, July 12, 1996.


R. Bruce Beckner

Dated: July 12, 1996

EXHIBIT 1

In re: Application of
Liberty Cable Co., Inc

WT Docket No.
96-41

CONFIDENTIAL

Tuesday, May 28, 1996
Washington, D. C.

The deposition of PETER O. PRICE, called for examination by counsel for Time Warner Cable of New York City in the above entitled matter, pursuant to notice, in the offices of Fleischman and Walsh, D.L.P., 1400 16th Street, N.W., Sixth Floor, Washington, D.C. convened at 9:35 a.m., before David A. Kasdan RPR a notary public in and for the District of Columbia, when were present on behalf of the parties